Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1995

MANFRED DeREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

I. Whether the Court should establish a propylactic rule requiring trial courts to advise a defendant that he has a constitutional right to testify should he desire?

II. Whether counsel is ineffective for failing to accede to his client's constant requests that he testify in his own defense when his testimony would be the sole rebuttal of the government's otherwise compelling case:

(a) Can a criminal defendant waive his right to testify by not objecting to counsel's refusal to call him as a witness?

(b) May counsel unilaterally waive a defendant's right to testify as a tactical matter in the face of the defendant's continued requests to testify?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.

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Petitioner Manfred DeRewal respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled proceedings on September 15, 1995. Petition for Rehearing was denied on October 16, 1995.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for Third Circuit, filed March 27, 1996 is Appendix B to this Petition. The Order of the Third Circuit denying rehearing is dated April 26, 1996 and is appended to this Petition as Appendix A. The Memorandum of the District Court denying the Motion to Vacate, Set Aside or Correct Sentence dated August 22, 1995 is appended as Appendix C.

Appended as Appendix D is the decision of the United States Court of Appeals for the Third Circuit dated November 9, 1993, reversing in part and affirming in part the action of the District Court. It is reported at 10 F.3d 100.

The Memorandum and Order of the District Court denying the motion is dated December 8, 1992 is attached as Appendix E. The opinion was not published.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 27, 1996. The Petition for Rehearing was denied on April 26, 1996. This Petition is filed within 90 days of December 8, 1993. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the Witnesses against him: to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Manfred DeRewal was indicted on March 9, 1988 and arrested on October 19, 1988. The indictment charged DeRewal with:

> Count 1: Conspiracy to Import P2P in violation of 21 U.S.C. § 963;
>
> Count 2: Importation of P2P in violation of 21 U.S.C. § 952(2) and § 960(2)(1), and;
>
> Count 3: Attempt to Import P2P in violation of 21 U.S.C. § 952(3) and § 960(2)(1).

The case was tried before a jury on January 25, 1989, with a verdict of guilty on all three counts being entered on February 7, 1989. DeRewal was sentenced to an aggregate ten year term of confinement, followed by special parole of ten years and five years' probation. An appeal was filed in the United States Court of Appeals for the Third Circuit which affirmed the judgment of conviction, and this Honorable Court refused to grant certiorari.

DeRewal then filed a *pro se* Motion for New Trial pursuant to Fed. R. Crim. P. 33, on March 22, 1991, based on newly discovered evidence. That motion was denied on July 9, 1991. An appeal was taken to the United States Court of Appeals for the Third Circuit, which was dismissed by agreement on January 2, 1992.

DeRewal, on April 21, 1992, filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. Following the Report and Recommendation of the Magistrate

Judge, the District Court denied the motion on December 22, 1992. The United States Court of Appeals reversed in part and affirmed in part the decision of the District Court. This Honorable Court denied certiorari, and the matter was returned to the District Court.

After a hearing in the District Court, the motion was again denied on August 22, 1995. The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court, and the Petition for Writ of Certiorari now before the Court was filed.

B. Basis for Federal Jurisdiction

The jurisdiction of the District Court was initially invoked in this case under 28 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The proceedings considered herein were based on 28 U.S.C. § 2255. The jurisdiction of the Court of Appeals rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

C. Statement of Facts

Manfred DeRewal was convicted of conspiracy to import P2P into the United States as well as the importation of seventeen gallons and the allegedly aborted attempt to import 100 gallons.

The evidence against DeRewal consisted mainly of the testimony of Daniel Rufe, a long time friend of DeRewal and his alleged partner in the importation conspiracy. The government also used as evidence telephone conversations to and from DeRewal's home in Costa Rica, which were interpreted and recorded pursuant to a search warrant issued in Costa Rica. The taped conversations were interpreted by the witnesses for the government so as to incriminate DeRewal in the importation and to corroborate Rufe's testimony.

Pretrial, DeRewal's counsel attempted to suppress the Costa Rican wiretap by alleging improper conduct in obtaining the order, claiming interference and improper influence by the resident DEA agent in Costa Rica. However, counsel was unable to substantiate the allegations of misconduct, as he had failed to investigate the issue and the motion was denied. Post sentence, an investigation was conducted in Costa Rica on behalf of DeRewal, uncovering evidence that the search warrant might not have been properly issued and may even have been a fraudulent document.

Evidence was uncovered that contrary to the testimony at the suppression hearing, the operation in Costa Rica was an investigation conducted solely for the United States at the behest of a DEA agent, concerning activity which was neither in violation of Costa Rican law nor part of a Costa Rican investigation. It was a DEA investigation originating from its office in Philadelphia, Pennsylvania. Contrary to the testimony at the suppression hearing, the resident DEA agent in Costa Rica directed the investigation, monitored the tapes and kept those which he considered of value. The source of these allegations is none other than the then chief of the narcotics section of the Costa Rican counterpart of the FBI. This individual contradicted the testimony of his assistant who was the witness offered by the government at the suppression hearing and trial of this case.

At the hearing on the motion a video taped deposition of a Costa Rican attorney supported the statement of the Costa Rican chief of narcotics that the investigation was solely an operation of the DEA.

Counsel was totally unprepared for trial, and in the § 2255 Motion DeRewal specified numerous instances of his attorney's failure to investigate the case, including the refusal to interrogate witnesses and to call witnesses at trial. There were numerous

witnesses and documents available to refute the prosecution's case, none of which were utilized by defense counsel although counsel had been give detailed information regarding the identity of the witness, their addresses and the specific of their testimony. All of this information was either testified to or specified in affidavits attached to the § 2255 Motion.

DeRewal was concerned that despite his repeated requests, counsel had not prepared any defense. The witnesses had not been contacted, interviewed or subpoenaed. Prior to trial and during the course of the trial DeRewal told counsel that he wanted to testify. His attorney agreed to call him as a witness, but rested the defense without calling Mr. DeRewal, who was unaware that he had the right to testify or could object to the failure to call him as witness.

DeRewal's testimony would have refuted that of Daniel Rufe and would have explained the meaning of the intercepted telephone calls. He would have been able to defend himself against the charges with testimony that would have proved the legality of his actions, underscoring the fact that Mr. Rufe's actions were in an attempt to obtain a beneficial result in his pending criminal and potential forfeiture proceedings. It would have been the only testimony which contradicted the prosecution's case due to counsel's failure to present the case.

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT SHOULD BE MADE AWARE BY THE TRIAL COURT OF HIS OR HER FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY.

The defendant's right to testify in his own defense is a fundamental right which is "essential to due process of law in a fair adversary process." *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 2709 (1987), quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S. Ct. 2525, 2533 n. 15 (1975). *Rock* holds that the right to testify is also part of the Compulsory Process Clause of the Sixth Amendment, noting that in many criminal cases the defendant is the most important defense witness. Quoting *Faretta v. California*, 422 U.S. at 819, 95 S. Ct. at 2533, *Rock* held at 483 U.S. at 52, 107 S. Ct. at 2709 that the Sixth Amendment

> grants to the accused ***personally*** the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." . . . A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

(Emphasis in *Rock*).

The defendant's right to testify is so fundamental that the

decision may not be left to counsel to decide. It is not the type of decision which rests solely with defense counsel. Rather, it is the type of fundamental decision which is left to the defendant. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) stated that type of decision encompassed whether or not to plead guilty, waiving the right to a jury trial, *whether to testify in one's own behalf,* whether to appeal or whether to waive counsel.

Likewise, the ABA Model Rules of Professional Conduct, No. 1.2(a) which reserves certain decisions of fundamental matters to the defendant states that:

> In a criminal case, the lawyer shall abide by the client's decision, . . . as to . . . whether the client will testify.

The decision as to whether to testify should not be delegated to the sole discretion of counsel regardless of the attorney's belief that it would be to the defendant's tactical advantage.

Regardless of the fundamental nature of the right to testify, many courts of appeal despite recognizing the right, require some affirmative action by the defendant in order to allow the right to be asserted. Trial courts are under no duty to advise a defendant of his right to testify, and there is no requirement of an on the record colloquy before the right may be waived.

Fundamental and personal rights may only be waived by the one who owns that right, the criminal defendant.

> The general rule is clear that the relinquishment of such a right must be intentional, and to be intentional must be known to the one who gives it up.

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938).

However, the prevailing rule is that there is no obligation upon the court to determine whether there has been a knowing and intelligent waiver of the right to testify. Counsel has been delegated the responsibility to advise the client and make the decision, as opposed to the trial court, because such a decision is a matter of trial strategy between counsel and his client. It is reasoned that any discussion of the right to testify by the court would intrude into the attorney/client relationship protected by the Sixth Amendment. Another excuse for not allowing the judge to address the question is that such actions might encourage the defendant to invoke or to waive the right.

An anomaly is created by recognizing the defendant's fundamental right to testify as protected by the Fifth and Sixth Amendment, yet not establishing any method by which to determine whether the defendant knows of the right or has knowingly relinquished it. The Court of Appeals recognize the right but do nothing to protect it. *United States v. Joelson,* 7 F.2d 174, 177 (9th Cir. 1993); *Underwood v. Clark,* 939 F.2d 473 (7th Cir. 1991); *United States v. Martinez,* 883 F.2d 750 (9th Cir. 1989); *United States v. Bernloehr,* 833 F.2d 749 752 (8th Cir. 1987) (apparent acquiescence to counsel's decision); *United States v. Systems Architects, Inc.,* 757 F.2d 373, 375 (1st Cir. 1985), *cert. denied,* 474 U.S. 847, 106 S. Ct. 139 (1985); *United States v. Janoe,* 720 F.2d 1156, 1161 n. 9 (10th Cir. 1983), *cert. denied,* 465 U.S. 1036, 104 S. Ct. 1310 (1984).

The right to testify has been tied to the right to counsel, and what should be a fundamental personal right has been made subject to the "guiding hand of counsel" and has been held to be a tactical decision to be made by the defendant and his attorney. *Brooks v. Tennessee,* 406 U.S. 605, 612, 92 S. Ct. 1891, 1985

(1972). There is no question that counsel should advise a defendant about the ramifications of testifying in his own behalf and the pitfalls which may face he or she upon taking the witness stand. However, the ultimate decision as to whether or not to testify must rest with the defendant, who is the only person to make the ultimate decision, not the attorney.

This Court has established procedural protections to ascertain that the waiver of an important personal right is made in a knowing and intelligent manner, so as to conform with the constitutional standards. In areas such as waiver of a jury trial, waiver of the right to counsel and the entry of a guilty pleas, it has required a colloquy with the defendant by which he or she is advised of the nature of the right and that any waiver is done in a knowing and intelligent manner. It is a rather simple process which, when compared with the nature of the right and its importance, is of negligible impact upon the time of the court and certainly, considering the fundamental nature of the right cannot be claimed to inconvenience the trial court.

The dissent of Judge Reinhardt in *United States v. Martinez, supra* at 766 sets forth the prevailing reasons why an inquiry requirement should not be established as held by in the majority opinion in that case, 883 F.2d at 760. His argument makes an overwhelmingly compelling case for the establishment of a rule to require a defendant be advised of his right to testify. The reasons are:

1. To be recognized, the right to testify must be asserted;

2. The right to testify must be asserted at the time of trial. Judge Reinhardt notes that if there was a rule of inquiry, it would not be necessary to attempt to reconstruct what might have taken place at a later time;

3. The right to testify "counterpoises the privilege against compelled self incrimination." Regardless of the implication of advising a defendant of his or her right against self-incrimination, he or she is provided with the option of choosing between alternative constitutional rights. An in-court discussion where the choices available to the defendant are explained is no threat to the free exercise of the privilege against self-incrimination;

4. Interference with the attorney/client relationship. Such has not been the case with reference to other areas in which there is a colloquy between the court and a defendant regarding any other personal or fundamental right. In fact, an educated defendant is better equipped to discuss trial strategy and tactics with his attorney;

5. The danger that a judge's admonitions would introduce error into the trial is without any support. To advise a defendant of a basic right of which he might otherwise not be aware makes the trial fairer and only serves to guarantee protection of the Fifth and Sixth Amendment guarantees;

6. Doubt as to when the trial court should question the defendant. The answer is obvious, as when the defense rests (or just before) is an appropriately convenient time which would not interfere with the trial;[1]

7. The judge should not interfere with defense strategy. An informed defendant is better able to help decide defense strategy, and allows the defendant to make an informed decision. It would not interfere with the defense,

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1. A more appropriate time might be immediately after the prosecution rests, which would provide the defendant a meaningful opportunity to discuss with counsel the propriety of testifying in terms of overall defense strategy.

but would assist, especially when the defendant is not aware of his right to testify or where counsel has overcome his client's desire to testify.

As Judge Reinhardt stated:

> Even were the normal colloquy rule inapplicable, there could be no surrender of a personal and fundamental constitutional right without an affirmative representation by the defendant that he wished to waive his rights. The most basic rule of construction in waiver cases is that a personal relinquishment cannot be inferred from the defendant's silence; see, e.g., *Barker v. Wingo,* 407 U.S. 514, 526, 92 S. Ct. 2182, 2189, 33 L. Ed. 2d 101 (1972); *Boykin,* 395 U.S. at 244, 89 S. Ct. at 1712; *Barber v. Page,* 390 U.S. 719, 725, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255 (1968); *Ostlund v. Bobb,* 825 F.2d 1371, 1373 (9th Cir. 1987); rather, if the right is personal, the trial court must direct an inquiry to the defendant. *Carnley,* 369 U.S. at 516, 82 S. Ct. at 890. Most important the record must contain an affirmative statement by the defendant evidencing his willingness to waive the right. See *United States v. Crowhurst,* 596 F.2d 389, 391 (9th Cir. 1979); *United States v. Aponte,* 591 F.2d 1247, 1249-1250 (9th Cir. 1978).

It seems that the reasons set forth to deny a colloquy are matters of convenience, fueled by the fear that advising a defendant of the right to testify would somehow be inconvenient or time consuming. Fundamental constitutional rights are not

inconveniences, nor are they technicalities to be brushed aside because it might take another fifteen minutes to advise the defendant, or in the case where a defendant exercises his right to testify it might consume another couple of hours or more. Our constitutional rights are worth that expenditure of time, and the desire to move a case along must give way to a citizen's basic and fundamental right.

It is respectfully suggested that this Honorable Court has the obligation to protect a defendant's right to testify by ascertaining that he or she be so advised.

II.

COUNSEL IS INEFFECTIVE FOR FAILING TO ALLOW A DEFENDANT TO TESTIFY IN THE FACE OF HIS REPEATED REQUESTS TO DO SO, WHERE THERE HAS BEEN NO DEFENSE PRESENTED AND NO DISCUSSION BETWEEN ATTORNEY AND CLIENT REGARDING THE DESIRE TO TESTIFY.

Petitioner Manfred DeRewal wanted to testify in his defense. For weeks prior to trial he reminded trial counsel of his desire and during the course of the trial he persisted in his request. Counsel agreed to call him as a witness, but at the last moment, without discussing his decision with DeRewal, rested the case without calling him to the stand. His reason, given after the case was closed was that he felt that the government had not proved its case. The district court, in its opinion, Appendix C, noted that counsel "advised DeRewal not to testify." That was not the testimony. DeRewal was told by his attorney after he rested that he decided not to call him as a witness. DeRewal was terribly upset, but had no idea he could protest to the court. The record indicates that the decision not to call DeRewal was a unilateral one on the part of counsel. The district court, whose

reasons were accepted by the Third Circuit found it was a reasonable tactical decision not to call DeRewal, as counsel may have reasonably concluded, that having his client testify subject to cross-examination presented too high a risk.

Such a finding is outrageous and does as much to subvert DeRewal's rights as did the ineffective assistance of counsel he received. The failure to allow DeRewal to testify was the last and most egregious of counsel's errors which resulted in denying DeRewal a fair trial because of counsel's inept and unprofessional handling of the defense throughout the entire course of the proceedings. Both the unrebutted testimony and affidavits of the defendant show that counsel did nothing to investigate the case despite being provided with detailed information by the defendant including the names of witnesses and their respected testimony. The government's case was not rebutted by the defense and DeRewal felt he had to testify to establish a defense. Counsel was well aware of his client's intense desire to testify, but ignored it.

Such action on the part of counsel amounted to no representation at all, and more than meets the standards for ineffective assistance of counsel established by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

To show that counsel has been ineffective, it must be established that "counsel's representation fell below an objective standard of reasonableness." The deficient performance of counsel must be so serious as to ". . . deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 688, 104 S. Ct. 2064.

Strickland holds that counsel must act in such a manner as to be an advocate with the specific obligation to consult with his client and to keep him informed of developments in the case.

> Counsel also has the duty to bring to bear such skill and knowledge as will render the trier a reliable adversarial testing process.

466 U.S. at 689,104 S. Ct. at 2052.

Once counsel's performance is shown to be deficient, the defendant must show that the defense was prejudiced thereby. *Strickland* requires:

> . . . showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687,105 S. Ct. at 2064.

In evaluating the performance of counsel, deference must be given to counsel's performance, taking into consideration why counsel acted as he or she did. It is all to easy to be a Monday morning quarterback and *Strickland* holds that in evaluating the conduct of counsel ". . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy." 466 U.S. at 689,104 S. Ct. at 2065.

In judging a claim of ineffectiveness each case must be considered on its own facts, as of the time of counsel's conduct. *Strickland* states that it must be determined whether the identified *acts* are sufficient to show incompetence, holding that the full effect of counsel's derelictions must be considered in making the ultimate decision as to ineffectiveness. 466 U.S. at 691, 104 S. Ct. at 2066.

As previously discussed, the right of a defendant to testify

is a basic and fundamental right. Counsel's failure to call DeRewal to the witness stand resulted in a trial so skewed toward the prosecution so as to deny DeRewal effective assistance of counsel.

DeRewal wanted to testify. He objected to counsel when he was not called, but said nothing to the judge, because, as he testified, he was unaware that he could speak up. As the right can only be waived by the defendant, *Foster v. Delo,* 11 F.3d 1451, 1457 (8th Cir. 1993); *United States v. DiSalvo,* 726 F. Supp. 596 (E.D. Pa. 1989), counsel acted improperly.

Counsel had done little to prepare the case for trial and was unable to rebut the prosecution's case which consisted of intercepted telephone calls involving DeRewal and the testimony of an alleged co-conspirator who implicated DeRewal. DeRewal justly felt that he had to explain the meaning of the telephone calls as well as testify regarding his lack of involvement with Rufe. He was not allowed to, and was seriously prejudiced. The failure of counsel to interview or call witnesses and to cross-examine Rufe with his prior testimony and other documents was compounded by the refusal to call DeRewal as a witness. Had DeRewal testified there would have been a strong likelihood of an acquittal.

The decision of the Third Circuit is contrary to decisions of other circuits, which hold that there must be some type of waiver of the right to testify, which, *inter alia* includes evidence that there was advice of counsel and some evidence of knowledge of the manner by which the right could be asserted *Foster v. Delo, supra; Lema v. United States,* 987 F.2d 48, 52-53 (1st Cir. 1993); *United States v. Martinez,* 883 F.2d 750 (9th Cir. 1989); *United States v. Bernloehr,* 833 F.2d 749; 751-752 (8th Cir. 1987). In the case at bar there was no evidence of acquiescence, nor was there any evidence that DeRewal knew of the fundamental nature of the right or the means by which it could be asserted.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED APRIL 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1801

UNITED STATES OF AMERICA

v.

MANFRED DeREWAL,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, *CHIEF JUDGE*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and SAROKIN
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix A

BY THE COURT

s/ Theodore A. McKee
Circuit Judge
Hon. Theodore A. McKee

DATED: APR 26 1996

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 27, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1801

UNITED STATES OF AMERICA,

v.

MANDRED T. DeREWAL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No.: 88-cr-00361-01
District Judge: Honorable James McGirr Kelly

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 19, 1996

Before: BECKER, McKEE, *Circuit Judges*,
and McKAY, *Senior Circuit Judge**

JUDGMENT ORDER

After consideration of the contention raised by the appellant, to wit, that the district court erred in finding that

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* The Honorable Monroe G. McKay, United States Court of Appeals Judge for the Tenth Circuit, sitting by designation.

appellant was not entitled to relief pursuant to 28 U.S.C. § 2255 because he was not denied effective assistance of trial counsel, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 24, 1995, be and is hereby affirmed substantially for the reasons set forth in Judge Kelly's opinion.

BY THE COURT.

s/ illegible
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

MAR 27 1996

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED AUGUST 23, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 88-98

CIVIL ACTION NO.
92-2310

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM

J.M. KELLY, J. **AUGUST 22, 1995**

Presently before the court is Defendant Manfred DeRewal's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the Motion will be denied.

BACKGROUND

Defendant Manfred DeRewal was indicted in 1988 for one count of conspiracy to import phenyl-2-propanone ("P2P") into the United States from Costa Rica, in violation of 21 U.S.C. § 963, one count of importation of P2P, in violation of 21 U.S.C. § 952(a), and one count of attempting to import P2P, in violation

of 21 U.S.C. § 963. Before trial, Defendant moved to suppress the fruits of wiretaps in Costa Rica, contending that the United States government was extensively involved in the wiretap operation and that his Fourth Amendment rights were violated. The court did not find such extensive American involvement or a violation of Costa Rican law.

DeRewal was convicted of all three counts and sentenced to ten years in prison. His appeal of his conviction was unsuccessful. Defendant then filed a motion for a new trial, claiming that newly discovered evidence showed substantial involvement of American agents in the wiretap. The court found it unlikely that the new evidence would have produced an acquittal and denied the motion.

Defendant then filed the instant motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Defendant advanced two arguments. First, he claimed that his trial counsel was ineffective because he had failed to investigate the case adequately prior to trial. Second, he argued that the conduct of United States agents in obtaining the Costa Rican wiretap was so egregious as to warrant dismissal.

The motion was referred to a magistrate judge, who denied the motion because DeRewal had not met the "cause and prejudice" standard set out in *United States v. Frady*, 456 U.S. 152 (1982). Specifically, the magistrate judge found that Defendant had not shown "cause" for failing to raise his ineffective assistance of counsel claim on direct appeal or in his motion for a new trial. The magistrate judge also denied Defendant's claims about misconduct in obtaining the wiretap because the claims were based not on trial error but evidence discovered after trial. This court adopted the report and recommendation of the magistrate judge.

On appeal, the Third Circuit affirmed in part and reversed in part. The court held that the *Frady* standard did not apply to claims of ineffective assistance of counsel, and that a Section 2255 motion was a proper vehicle for first raising the claim. *United States v. DeRewal,* 10 F.3d 100, 105 (3d Cir. 1993). The court did, however, affirm the denial of the government misconduct claim. *Id.* Thus, the Third Circuit reversed and remanded the ineffective assistance counsel claim to this court.[1] *Id.* at 106.

DISCUSSION

There are two main prongs to Defendant's ineffective assistance of counsel argument. First, DeRewal argues that his trial counsel did not adequately investigate the case prior to trial. DeRewal claims that his own investigation following his conviction revealed information that could have been beneficial to his defense, mainly in connection with the Costa Rican wiretap. Second, DeRewal believes that his trial counsel wrongly prevented him from testifying in his own defense and that counsel failed to call other witnesses who could have exculpated DeRewal.[2]

Upon consideration of the written briefs and a two-day hearing, the court finds DeRewal's claim of ineffective

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1. In addition to the instant § 2255 motion, the court found earlier this year that Defendant violated his probation and sentenced him to three years in prison. Defendant's appeal of that decision is currently pending before the Third Circuit.

2. Defendant's claim that his trial counsel prevented him from testifying was first presented at the hearing of this motion.

assistance of counsel to be without merit. The standard for judging ineffective assistance of counsel claims is whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). There are two elements to the *Strickland* test. First, the petitioner must demonstrate that counsel's performance was deficient by proving that the "representation fell below an objective standard of reasonableness", *Id.* at 688. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Second, the petitioner must also show prejudice, in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Defendant has not met either prong of the *Strickland* test.

DeRewal's first claim is that his trial counsel failed to investigate the case adequately prior to trial. In support of this claim, DeRewal presents evidence that he discovered after his conviction. Defendant presents video depositions and affidavits of individuals in Costa Rica to show that the Costa Rican wiretap was in reality an operation of the United States Drug Enforcement Agency ("DEA") and that the warrant for the wiretap was not properly obtained.

Defendant does not succeed in proving trial counsel's preparation to be deficient because the evidence presented is of little value. The first videotape deposition is of a court clerk in Costa Rica, Arvin Perez Bonila, who stated that the judge for whom he worked did sign the wiretap approvals. Defendant withdrew this testimony during the hearing, conceding that the testimony was of no probative value. Another videotape

deposition was of Victor Mendoza, a Costa Rican attorney working on DeRewal's behalf by taking statements of others and reducing them to writing. The statements taken by Mr. Mendoza were not signed by the alleged affiants and it does not appear that the affiants swore to the statements. Mr. Mendoza's testimony in general was based on hearsay and not personal knowledge.

A general problem with the videotape depositions presented at the hearing was that Defendant's counsel administered the oath to the witnesses over the objections of the Assistant United States Attorney. In addition, Defendant's counsel led the witnesses during the depositions and even prefaced one question by stating that the purpose of the question was to prove that another witness was lying.

DeRewal's second complaint with his trial counsel's representation is that he prevented DeRewal from testifying in his own defense and that he did not call other witnesses who would have aided in DeRewal's defense. DeRewal testified at the hearing of his motion that he told his trial counsel several times that he wanted to testify and that he gave his counsel names of potentially helpful witnesses.

Defendant has failed to show that his trial counsel's representation was deficient or prejudicial with regard to both the pre-trial investigation and the failure to call certain witnesses. The evidence Defendant offers in support of his claim that the Costa Rican wiretap was improperly obtained consists of unsigned affidavits or videotape depositions where Defendant's counsel administered the oath. The evidence does not establish that the wiretap was improperly obtained or that the wiretap was mainly a DEA operation. For instance, Defendant's claim that his own post-conviction investigation revealed that paperwork in

Costa Rica relating to the wiretap was missing or misnumbered could be a result of error rather than improper action by either the Costa Rican authorities or American agents. Based on the lack of probative value in this evidence, the court finds no deficiency in trial counsel's alleged failure to pursue these "leads".

Similarly, DeRewal's claim that his trial counsel was deficient in not permitting him or other witnesses to testify is unconvincing. DeRewal states that he told his counsel on several occasions that he wished to testify in his own defense. DeRewal claims that on the last day of trial, his attorney told him that the government had not proven its case and that he advised DeRewal not to testify. (DeRewal Hearing Testimony at 21). The court does not find counsel's advice deficient or outside the boundaries of reasonable professional judgment. It was reasonable for trial counsel to take the strategy of attacking the sufficiency of the government's evidence rather than place Defendant on the witness stand. Had Defendant testified and been cross-examined, he would have had to admit that he was in the business of selling P2P in Costa Rica.[3] (DeRewal Hearing Testimony at 44). Trial counsel may have reasonably concluded that having Defendant testify subject to cross-examination was too high a risk.

The court is also not persuaded that trial counsel was mistaken in not calling the witnesses DeRewal now claims should have been called. DeRewal states that he gave the names of the potential witnesses to counsel, but can only say at best that he assumes that he told counsel what he thought the witnesses knew. (DeRewal Hearing Testimony at 27). DeRewal does not know whether his attorney interviewed the witnesses. (DeRewal

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3. The selling of P2P remained legal in Costa Rica until 1988.

Hearing Testimony at 27). Furthermore, Defendant has not shown that the witnesses would have been helpful to his defense. One potential defense witness, Michael Giambi, is a convicted felon. (DeRewal Hearing Testimony at 30). Another witness, Jeff Qualls, accompanied Daniel Rufe, the person who drove the truck containing the P2P from Costa Rica. DeRewal's claim is that he did not know that Qualls and Rufe had purchased the P2P and were heading for the United States. DeRewal did not, however, provide the testimony of these witnesses as he did of the Costa Rican witnesses. The court is unaware of what exculpatory testimony Giambi, Qualls or Rufe could provide. Rather it is apparent that their testimony at trial could have been very harmful to Defendant.

Defendant has not established any deficiency in the representation of his trial counsel. The evidence that Defendant contends would have helped his defense could very well have further supported the jury's finding of guilt. Defendant has not shown that he was prejudiced in any way by the alleged failure of his attorney to use the evidence that DeRewal gathered in Costa Rica after his conviction or the testimony of Defendant and the witnesses Defendant now characterizes as beneficial to his defense. As Defendant has failed to meet the standard of ineffective assistance of counsel set forth in *Strickland,* his motion will be denied.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 15, 1995, DOCKET NO. 95-1142

Filed September 15, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1142

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 88-cr-00098)

Argued
August 2, 1995

Before: MANSMANN, HUTCHINSON and ROTH,
Circuit Judges.

(Filed September 15, 1995)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this appeal from the district court's order revoking Manfred DeRewal's probation, we address chiefly DeRewal's primary contention regarding the tension between the power of the judiciary to act on probation matters and the executive branch's power governing parole since DeRewal was on parole when the district court revoked DeRewal's probation that had not yet begun. This is an issue we specifically reserved in *United States v. Camarata*, 828 F.2d 974 (3d Cir. 1987), *cert. denied*, 484 U.S. 1069 (1988).

We hold that the district court properly exercised its jurisdiction in revoking DeRewal's probation for pre-

probation conduct occurring during a period of parole. Such judicial action regarding probation does not disturb the executive branch's authority to control DeRewal's parole.

DeRewal also contends that the conditions of his probation were modified without a hearing as required by Federal Rule of Criminal Procedure 32.1(b), that the district court erred in refusing to grant him access to the probation officer's entire file, and that there was insufficient evidence for the district court to find a violation of probation. We have considered each of the allegations of error and, finding them to be without substance, we will affirm the order of the district court.

I.

In March, 1988, Manfred DeRewal was charged with conspiracy to import P2P, importation of P2P, and attempting to import P2P into the United States from Costa Rica in violation of 21 U.S.C.A. §§ 952(a), 960(a)(1), 963 (West 1981) and 18 U.S.C.A. § 2 (West 1969). Following conviction, DeRewal was sentenced to 10 years of imprisonment followed by a ten year term of special parole. A five year probationary term was to run consecutively to the term of special parole.[1]

On December 17, 1992, DeRewal was released from

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1. DeRewal's direct appeal from the judgment of conviction and sentence was affirmed on October 12, 1989. DeRewal then filed a petition pursuant to 28 U.S.C. § 2255 raising ineffective assistance of counsel and other claims. The district court denied the petition. On appeal, we affirmed in part, reversed in part, and remanded the matter to the district court. *See United States v. DeRewal*, 10 F.3d 100 (3d Cir. 1993) (holding that a defendant is not required to show "cause and prejudice" with respect to his failure to raise ineffective assistance of counsel on direct appeal).

prison on parole, parole to run until October 18, 1998. The term of special parole would then run from 1998 until 2008, when the probationary period would begin.

On September 7, 1994, the United States Probation Department filed a Violation of Probation Petition against DeRewal, alleging that he had violated those three conditions of probation which required him (1) to answer truthfully inquiries from and follow the instructions of his probation officer; (2) to refrain from associating with those engaged in criminal activity or convicted of a felony; and (3) to refrain from violating any law.

DeRewal's motion to dismiss the petition for lack of jurisdiction was dismissed and a hearing was held on the merits of the Probation Department's Petition. DeRewal filed a motion seeking to review his probation file in its entirety. Following the district court's denial of this motion, the government presented the testimony of DeRewal's neighbor who had overheard telephone conversations as a result of an illegal splice into her telephone line. Testimony was also given by telephone employees, DeRewal's probation officer, and FBI agents.

At the conclusion of the testimony, the district court found that DeRewal had violated the terms of his probation and sentenced him to 36 months imprisonment. This timely appeal followed in which we confront the issue of judicial power to alter probation during a pre-probation period of parole which is governed by the authority of the executive branch.

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II.

In *Affronti v. United States*, 350 U.S. 79 (1955), the Supreme Court confronted the question of whether a district court has authority to place a defendant on probation once he has begun to serve the first in a series of consecutive sentences. The Court cautioned that statutory authority *to grant probation* should not be "applied in such a way as to necessarily overlap the parole and executive clemency provisions of the law" and should be interpreted "to avoid interference with the parole and clemency powers of the Executive Board." *Affronti*, 350 U.S. at 83. The Court then concluded, utilizing broad language, that "the probationary power ceases with respect to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence." *Id.*

In *United States v. Williams*, 15 F.3d 1356, 1357 (6th Cir.), *cert. denied*, 115 S. Ct. 431 (1991), the Court of Appeals for the Sixth Circuit concluded that "a district court does have authority to revoke probation for pre-probation conduct, including the pre-probation conduct of a paroled convict." On facts substantially identical to those presented here, our sister court of appeals noted that 18 U.S.C. § 3651, applicable to offenses committed prior to November 1, 1988, unambiguously provides that

> [t]he court may revoke or modify any condition of probation, or may change the period of probation.

The court then considered whether a district court's revocation of probation based upon conduct committed while a defendant was on parole would raise a separation of powers concern. Finding that no such concern was implicated, the court analyzed *Affronti*:

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> In *Affronti*, the Supreme Court held that once a convict has begun serving a custodial sentence, a court may not modify a subsequent custodial sentence into a probational sentence. The Supreme Court reasoned that such authority would interfere with the executive's power to make decisions concerning parole and executive clemency.

United States v. Williams, 15 F.3d at 1362. The court emphasized that where parole is *revoked*, the logic of *Affronti* breaks down.

> Where a convict's pre-probation conduct prompts a court to revoke a sentence of probation . . . the court does not modify an existing custodial sentence. Rather, the court effectively converts a probationary sentence into a custodial sentence. The possibility that a probationary sentence would be converted into a custodial sentence is inherent in the very notion of probation. Furthermore, the conversion of a probationary sentence into a custodial sentence still leaves the executive free to administer the converted sentence . . . Further, judicial authority to revoke probation for pre-probation conduct seems especially unlikely to disrupt the balance of power in cases such as this in which agents of the executive have requested the court to revoke probation.

Id. at 1363-64.

We conclude, as did the court in *Williams*, that neither the statute granting the district court authority to revoke or modify a period of probation nor the Supreme Court decision in *Affronti* suggests that it was error for the district court to revoke DeRewal's probation. Because "the authority to revoke probation for pre-probation conduct does not concentrate power in the judiciary so as to disrupt the balance of power amongst the legislative, executive, and judicial branches," the rule announced in *Affronti* is not undermined. *Id.* The district court's revocation of probation does not interfere with the ability of the executive branch to alter DeRewal's parole. The power to act under this factual scenario is not exclusively vested in the executive branch; parole and probation are mutually exclusive, respectively controlled by the executive branch and the judiciary.

We note DeRewal's assertion that the district court lacked jurisdiction to entertain a Petition for Violation of Probation where DeRewal was on parole when his probationary term was not to commence until the year 2008 finds support in the decision of the Court of Appeals for the Fifth Circuit in *United States v. Wright*, 744 F.2d 1127 (5th Cir. 1984). There, on facts very similar to those now before us, the court held that the district court has no authority to revoke probation for conduct committed during a period of parole where the defendant has been sentenced in the same case to a consecutive term of probation.

Although dealing with different facts,[2] Chief Judge

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2. Following conviction on several counts of a federal indictment, Camarata was sentenced to imprisonment and a consecutive term of probation. Prior to completion of the term of imprisonment, Camarata committed additional crimes. The district court relied upon these crimes in revoking probation.

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Sloviter, the writer of the lead opinion for the court in *Camarata* was critical of *Wright*, and supportive of the *Williams* approach. Rejecting Camarata's arguments based on *Wright* and *Affronti* she found *Affronti* to be of limited application:

> [In *Affronti*,] the Court stated that it was "concerned with the power to *grant* supervision of [unexecuted] sentences." It framed the question as whether it should "read the statute to mean that courts should be able to *suspend* the uncommenced terms of a cumulative sentence after the prisoner has been imprisoned and entered upon the execution of a prior term?" and answered in the negative. *Affronti* did not deal with the district court's power to revoke probation. As Judge Pollak, the district judge in this case, explained, "to revoke probation is not to pose the difficulties of overlap which conflicted with the parole and clemency authorities" since "[r]evoking a probationary term which follows a term of incarceration does not stop the parole authorities from making such adjustments of the term of incarceration as they think appropriate."

828 F.2d at 979 (citations omitted). We agree with her analysis.

We here state our agreement with the analysis of the Court of Appeals for the Sixth Circuit in *Williams* where, on

analogous facts, it concluded that *Affronti* was misapplied in *United States v. Wright* and should not be read to prohibit the district court from revoking probation based on pre-probationary conduct.

III.

Having resolved that there was no jurisdictional impediment to the district court's action, we turn next to DeRewal's argument that the conditions of his probation were amended in violation of Fed. R. Crim. P. 321(b). The Conditions of Probation Nos. 2 and 6 on the Judgment and Commitment Order specified that DeRewal was to "(2) associate only with law-abiding persons and maintain reasonable hours; . . . [and] (6) follow the probation officer's instructions and report as directed," but the form that his probation officer required him to sign stated that "you shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer." DeRewal was found to have violated the latter condition. He objects that the different wording on the probation form made the applicable condition much more onerous and "added an entirely different class of person with whom DeRewal was not allowed to associate."

We believe that the distinction between these two conditions is insignificant. Any violation of the second version would certainly have contravened the first version as well. We also agree with the district court that the difference in the language of the two sections "is not a modification or enlargement of the conditions of a sentence of probation under . . . Fed. R. Crim. P. 32.1(b). The change in the description of

the condition clarified the condition but did not make a substantive change." *United States v. DeRewal*, No. 88-00098-01, slip op. at 5-6 (E.D. Pa. Feb. 7, 1995).

IV.

Federal Rule of Criminal Procedure 32.1(a)(2)(B) provides that, at a revocation hearing, a defendant is entitled to "disclosure of the evidence against him." The caselaw is in accord. *See, e.g., United States v. Guardino*, 972 F.2d 682, 689 (6th Cir. 1992). Neither the rule nor the caselaw can reasonably be read, however, to require automatic production of a probation officer's entire file, even where the officer is a witness. The record before us establishes that DeRewal was provided with relevant documents from the file and was further protected by the district court's in camera review. We conclude that the district court did not err in refusing to order the production of the probation officer's entire file.

V.

Lastly, we address DeRewal's contention that the evidence adduced at the revocation hearing was insufficient to establish a violation of probation. "In order to revoke probation, it is necessary 'only that the court be reasonably satisfied that [the probationer] has violated one of the conditions of his probation.' " *United States v. Barnhart*, 980 F.2d 219, 223 (3d Cir. 1992) (quoting *United States v. Manuszak*, 532 F.2d 311, 317 (3d Cir. 1976)). Having reviewed the record before us, we are satisfied that the evidence fully supports the district court's exercise of its discretion in revoking DeRewal's probation for the reasons set forth in its February 7, 1995 Memorandum and Order.

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VI.

We will affirm the district court's order of February 7, 1995 revoking DeRewal's probation and sentencing him to three years imprisonment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E— JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 15, 1995, DOCKET NO. 95-1142

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1142

UNITED STATES OF AMERICA

vs.

MANFRED DEREWAL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 88-cr-00098)

Before: MANSMANN, HUTCHINSON and ROTH,
Circuit Judges.

Present: Mansmann, Hutchinson and Roth, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on August 2, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

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Court entered on February 10, 1995, be, and the same is hereby affirmed in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: September 15, 1995